

No. 14,768

IN THE

United States Court of Appeals  
For the Ninth Circuit

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LY SHEW, as Guardian Ad Litem of  
Ly Moon and Ly Sue Ning, Minors,  
*Appellant,*

vs.

JOHN FOSTER DULLES, as Secretary of  
State of the United States,  
*Appellee.*

BRIEF OF APPELLEE.

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**BRIEF OF APPELLEE.**

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**PRELIMINARY STATEMENT.**

The previous judgment rendered in favor of defendant was vacated by the decision of this Court (219 F. 2d 413), and the cause was remanded "with directions to make findings as to whether Ly Shew was the father of Moon and Ning, such findings to be made in the light of this opinion." The trial court, pursuant to the mandate, rendered a supplemental opinion and findings upon the remand and judgment was again entered in favor of the defendant.

### SPECIFICATION OF ERRORS.

Appellants have made two specification of errors:

- (1) Appellants were denied due process of law by the arbitrary action of the trial court in refusing to accept uncontradicted and unimpeached testimony.
- (2) The trial court failed to obey the mandate.

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### SUMMARY OF ARGUMENT.

(1) Appellants ask this Court to *retry* the facts, and upon application of *United States v. U. S. Gypsum Co.*, 333 U.S. 364, to reverse the trial court as “clearly erroneous.” The appellate court is not a fact finding de novo trial court. The court below viewed the witnesses and had the “live feel of the open forum” and its judgment is not “clearly erroneous.”

(2) The court below fully complied with the mandate of this Court.

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### ARGUMENT.

(1) THE JUDGMENT OF THE COURT BELOW IS NOT  
“CLEARLY ERRONEOUS”.

(a) The burden of proof was upon the appellants to establish their claims.

*Bauer v. Clark*, (CA-7), 161 F. 2d 397;

*Mar Gong v. Brownell*, (CA-9), 209 F. 2d 448;



*Elias v. Dulles*, (CA-1), 211 F. 2d 520;  
*Brownell v. Lee Mon Hong*, (CA-9), 217 F. 2d 143;  
*Chow Sing v. Brownell*, (CA-9), 217 F. 2d 140;  
*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d 146;  
*Fong Wone Jing v. Dulles*, (CA-9), 217 F. 2d 138;  
*Wong Ken Foon v. Brownell*, (CA-9), 218 F. 2d 444;  
*Lew Wah Fook v. Brownell*, (CA-9), 218 F. 2d 924;  
*Lue Chow Kon v. Brownell*, (CA-2), 220 F. 2d 187;  
*U. S. ex rel Dong Wing Ott v. Shaughnessy*, (CA-2), 220 F. 2d 537;  
*Lee Dong Sep v. Dulles*, (CA-2), 220 F. 2d 264;  
*Ng Kwock Gee v. Dulles*, (CA-9), 221 F. 2d 942.

This Court, in reversing and remanding the previous judgment, stated:

“We hold that Moon and Ning’s burden of proof was the ordinary one.”

What constitutes the ordinary burden of proof in such a case as this was not defined. The case of *Mar Gong v. Brownell*, *supra*, was cited. The following is quoted from *Mar Gong*:

“We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we are also of the view that no

special quantum of proof should be exacted from any person claiming American citizenship *merely because of his racial origin.*” (Emphasis ours.)

At no time has there been a contention in any of the 903 cases that a special quantum of proof should be exacted from Chinese claimants simply because of racial origin. Judge Goodman’s opinion upon which the previous judgment was founded stated that “proof of alleged citizenship must be clear and convincing,” not as related to Chinese alone, but as to any claimant arriving at a port of entry of the United States and asserting the right to enter as a citizen by derivation under Section 1993.

*Lee Sing Far v. U. S.*, (CA-9), 94 F. 834;

*Woey Ho v. U. S.*, (CA-9), 109 F. 888;

*Lee Sim v. U. S.*, (CA-2), 218 F. 432;

*Ex parte Chin Him*, (Western D. N.Y.), 227 F. 131.

The specific finding of Judge Goodman in *Ly Shew* was “\* \* \* plaintiffs have failed to introduce evidence of sufficient clarity to satisfy or convince this court \* \* \* .” (Tr. p. 49.)

This Court, in *Chow Sing v. Brownell*, *supra*, specifically reviewed the similar finding of the District Court that “the person (Sing) who claims to be plaintiff Chow Sing, has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing or that the person (Sing) who appeared before the court claiming to be plaintiff Chow Sing is in truth and fact Chow

Sing," and found that said finding was not clearly erroneous. The same finding was found not clearly erroneous in the decision in *Fong Wone Jing v. Dulles*. This Court amended the opinion in *Chow Sing* to state—"However, it appears that the District Court proceeded on the theory that the burden of proof resting on *Sing* was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions—a theory which was and is untenable." The remarks of Judge Goodman during the further proceedings following the remand of the mandate must be viewed in the light of the foregoing considerations.

After considerable discussion between counsel and the court Judge Goodman made the following comment (Tr. March 11, 1955 p. 27):

"The Court. Because of the nature of the cases. That is all there is to it.

I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that 'A' gets judgment against 'B' for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare whether a person is or is not an American citizen.

The reason jurisdiction is invoked is because some official or government has said to Jones, 'Well, I am not going to let you vote here', or 'You can't come into the United States', or some other specific act which denied a man a right which he had if he were an American citizen.

So the statute says, it has given the Court the authority to declare whether a man is a citizen or not. That is really the basis upon which I proceeded in trying to formulate some rule that would be helpful. Apparently the judges up above didn't agree with that, although they have not yet held that this is an adversary proceeding of any kind.

It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all.

Mr. Gale. That is it."

(b) The credibility of a witness is a matter exclusively for the determination of the trial court.

*Chow Sing v. Brownell*, (CA-9), 217 F. 2d 140;  
*Mar Gong v. Brownell*, (CA-9), 209 F. 2d 448;  
*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d  
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*Lew Wah Fook v. Brownell*, (CA-9), 218 F. 2d  
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*Lee Dong Sep v. Dulles*, (CA-2), 220 F. 2d 264;  
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*Ng Kwock Gee v. Dulles*, (CA-9), 221 F. 2d 942;

*Wong Ken Foon v. Brownell*, (CA-9), 218 F. 2d 444.

(c) The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.

*Quock Ting v. U. S.*, 140 U.S. 417;

*Chin Yow v. U. S.*, 208 U.S. 8;

*Marcella v. C.I.R.*, (CA-8), 222 F. 2d 878, 883;

*Purcell v. Waterman SS. Co.*, (CA-2), 221 F. 2d 953;

*Tam Dock Lung v. Dulles*, (CA-9), 218 F. 2d 586;

*Law Don Shew v. Dulles*, (CA-9), 217 F. 2d 146;

*NLRB v. Howell Chevrolet Co.*, 204 F. 2d 79, 86, Affd. 346 U.S. 482;

*Noland v. Buffalo Ins. Co.*, (CA-8), 181 F. 2d 735, 738;

*Heath v. Helmick*, (CA-9), 173 F. 2d 157, 161;

*Flynn ex rel Yee Suey v. Ward*, (CA-1), 104 F. 2d 900, 902;

*Inouye v. Carr*, 98 F. 2d 46;

*Mui Sam Hun v. U. S.*, (CA-9), 78 F. 2d 612, 615;

*Easton v. Brant*, 19 F. 2d 46;

*Quong Sue v. U. S.*, (CA-9), 116 F. 316;

*Woey Ho v. U. S.*, (CA-9), 109 F. 888;

*Lee Sing Far v. U. S.*, 94 F. 834.

(d) The repeated recognition by United States Courts of the incidence of fraud in Chinese claims to

derivative citizenship must of itself require a judge to open his eyes and ears as to the nature of the evidence presented in support of a claim.

*U. S. v. Sing Tuck*—Justice Holmes, 194 U.S. 161;

*The Chinese Exclusion Case*—Justice Field, 130 U.S. 581;

*Ex parte Jew You On*—Judge Bourquin, 16 F. 2d 152;

*Fong Ging Hung v. Acheson*, (unreported)—Judge Lemmon, Civil Action No. 6599 (U.S. D.C. N.D. Cal.);

*Gee Fook Sing v. U. S.*—Judge Hanford, 49 F. 146;

*Lee Sing Far v. U. S.*—Judge Hawley, 94 F. 834;

*Lee Sai Ying v. U. S.*—Judge Rudkin, 29 F. 2d 108;

*Ly Shew v. Acheson*—Judge Goodman, 110 Fed. Supp. 50;

*Mar Gong v. McGranery*—Judge Westover, 109 Fed. Supp. 821.

The Second Circuit, in *U. S. ex rel Dong Wing Ott v. Shaughnessy*, 220 F. 2d 537, in ruling on the ground of appeal that the blood tests are unconstitutional as a violation of due process because applied discriminatorily to applicants solely of the Chinese race, held that the ground must fail for two reasons. *First*, that it is not established that they are applied solely to Chinese, and *second*, that there is sufficient evidence of unusual circumstances relating to appli-

cants born in China during the period in question to justify a requirement of such additional evidence. The court said, page 540:

“Such a classification based on the lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.”

The appellants' concept of the evidence sufficient to satisfy the burden of proof is to “merely go into the highlights”, with the expectation, as stated by appellants' counsel, “\* \* \* I know as a result of my experience that when he is turned over for cross-examination it will be gone into at great and extensive detail. So therefore I generally attempt to restrain myself to the highlights.” (Rep. Tr. Sept. 2, 1952, p. 19.) At page 112 of the same transcript in a colloquy between Mr. Gale and the Court:

“Mr. Gale. But in view of the fact that the mother is not present, in view of the fact that the father was absent at the time of the birth of one child, in view of the fact that there are no birth records, then we are thrown upon this method.

The Court. If that were the case anybody could get anybody else into the United States and establish their citizenship by the statement, ‘He is my brother. So and so is my sister.’ That would put the people of the United States at the mercy of any claimant as to who should enjoy the fellowship of citizenship here. That cannot

be the rule, that if a declaration of citizenship has to rest and depend for its validity solely upon the statement of a person that that is his brother or sister, it would be a pretty fragile structure upon which the Court could make a declaration under this statute of citizenship.”

In the supplemental opinion and findings upon remand (Tr. Rec. p. 77) Judge Goodman found:

“(3) In substantial respects, the evidence introduced by plaintiffs was inconsistent and contradictory and therefore not credible. Consequently it is not accepted as true. The burden of proving their citizenship rested upon plaintiffs. To sustain that burden plaintiffs had to prove by *preponderating* evidence that Ly Shew was their father. He may be, but plaintiffs did not sustain the burden of showing it. Hence, for that reason the Court’s finding is that Ly Shew was not the father of plaintiffs.” (Emphasis ours.)

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#### THE EVIDENCE.

(1) Ly Shew, the alleged father—contributed no evidence of probative value to the record. He had not seen the plaintiff Ly Sue Ning prior to her arrival in the United States, and as to the plaintiff Ly Moon, he stated on direct examination that “he does not recognize his appearance very much but he remembers the name” (Rep. Tr. p. 25, Sept. 2, 1952).

(2) Ly On—this alleged brother’s memory was very short on any matters other than the specific claim that he is the brother of the two plaintiffs and that he



lived with them in the village. He claimed (Rep.Tr. pp. 94-95) that none of the children in the village went to school prior to the time he left the village. As against that we have the very interesting testimony of the plaintiff Ly Sue Ning (p. 215) that although she lived in the Toy Shan District Village she could only speak the Hoy Ping District dialect because she had lived at the school with a teacher who spoke the Hoy Ping dialect. In response to the question "Where did you learn the Hoy Ping dialect?" she answered "When I was young I used to go to school and my teacher was from Hoy Ping District and I used to sleep in school." She also stated that her brother Ly Ming (Ly Moon) went to school at the same time but he did not sleep in the school with the teacher. Apparently, not having slept in the school, he did not learn the Hoy Ping dialect.

The color of the cement in the floor of the house—Ly On first stated that "It is white cement." His attention was then called to his testimony on his admission to the United States, when he testified that the floors were made of red tile. Following a brief recess (Rep.Tr. p. 99) his recollection was apparently refreshed when he admitted that the floor was red tile.

"Q. Have you refreshed your recollection on the color of the floors of this house that you say you lived in?

A. It seems it is red tile.

Q. What do you mean by 'it seems'?

A. He isn't sure but he is thinking about it now.

Q. Does he need some more time to think about it?

A. It is red tile.

Q. When did you recall it was red tile instead of white cement?

A. During the recess. He tried to remember and it seems it is red tile.”

The witness Ly Shew Ngor (Rep.Tr. p. 153), in response to the question “What was the color of the floor in your house?” answered “It is cement; a grayish white.”

Ly Shew Ngor—the testimony of this witness as related to her admission into the United States as the daughter of Ly Shew her alleged marriage thereafter and the birth of her children by an unidentified, unproduced and very nebulous husband, renders the testimony of this witness not credible. (Rep.Tr. pp. 167-186.)

Ly Moon and Ly Sue Ning—a reading of the transcript of the testimony of these two witnesses adequately supports the disinclination of the trial judge to accept their testimony.

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### CONCLUSION.

Upon the record as presented, the findings and judgment of the court below are adequately supported by the evidence and in accordance with *U. S. v. U. S. Gypsum Co., supra*, the judgment is not “clearly erroneous” and should be affirmed. The trial court did comply with the mandate of this Court. The entire reporter’s transcript of the proceedings on the hear-

ing before the trial judge upon the mandate of this Court is contained in the record herein. The contention by appellants that the trial court failed to obey the mandate is wholly unsupported by the record.

It is respectfully submitted that the judgment of the court below be affirmed.

Dated, San Francisco, California,

March 23, 1956.

Respectfully submitted,

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